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**Josephine Premila Sivaretnam v Ketua Pesuruhjaya
Suruhanjaya Pencegahan Rasuah Malaysia & Anor**

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HIGH COURT (GEORGETOWN) — JUDICIAL REVIEW
APPLICATION NO PA-25-30-05 OF 2024
ANAND PONNUDURAI J
25 JUNE 2024

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Administrative Law — Judicial review — Application for leave — Applicant filed judicial review application to quash notices issued by respondents under s 36(1)(b) of Malaysian Anti-Corruption Commission Act 2009 ('Act 694') — Whether mala fide proven — Whether exceptional circumstances existed — Whether respondents had power or jurisdiction under s 36 of Act 694 to issue notices requesting information for periods preceding coming into force of Act 694 — Whether saving clause provided under s 74 of Act 694 was applicable — Whether s 36 notices contravened arts 5, 7 and 8 of Federal Constitution — Whether there was arguable case — Whether exercise of functions in relation to criminal investigations amenable to judicial review — Anti-Corruption Act 1997 (Act 575) (Repealed by Act 694) s 32 — Federal Constitution arts 5, 7 & 8 — Malaysian Anti-Corruption Commission Act 2009 ss 36 & 74 — Prevention of Corruption Act 1961 (Repealed by Act 575) — Rules of Court 2012 O 53

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The applicant via the present judicial review application under O 53 of the Rules of Court 2012 sought to quash three notices to obtain information issued by the Malaysian Anti-Corruption Commission pursuant to s 36(1)(b) of the Malaysian Anti-Corruption Commission Act 2009 ('Act 694') and a declaration that the said notices were invalid. In this regard, the request for

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information to the applicant was on the basis that she was an associate of one Abdul Daim bin Zainuddin who was under investigation. The issue to be determined by the court was whether leave of judicial review application should be granted. The crux of the applicant's submission was that the said s 36 notices were illegal and/or ultra vires primarily due to the fact that the information sought via the notices dated back to 1997 but s 36 of Act 694 came into force only in 2009, as such, the utilisation of the said s 36 notices was in excess of jurisdiction as the said notices being a tool to investigate were non-existent prior to the enactment of Act 694. Further, the applicant argued that although the respondents had the power to investigate offences prior to

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Act 694 via the Prevention of Corruption Act 1961 (Act 57) (Repealed by Act 575) and the Anti-Corruption Act 1997 (Act 575) (Repealed by Act 694) but the said s 36 notices could only be utilised from the effective date of 2009 and that the saving clause in s 74 of Act 694 did not assist the respondents. Lastly, the applicant argued that the said s 36 notices issued by the respondents had

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violated the applicant's constitutional rights guaranteed under arts 5, 7 and 8 of the Federal Constitution and therefore unconstitutional.

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Held, dismissing the application for leave with no order as to costs:

- (1) The applicant's contention that the said s 36 notices were illegal/ultra vires was without merit for the following reasons: (a) prior to Act 694, the public prosecutor had powers to issue notices seeking information under s 32 of the Anti-Corruption Act 1997 which was in pari materia with s 36 of Act 694; (b) since the investigation into the possible offences committed by Abdul Daim was only commenced after the coming into force of Act 694, then, notwithstanding that the information so requested by the said notice may related back to 1997, the said s 36 notices were still valid and properly issued by the respondents; (c) if the respondents had the power vide Act 694 to initiate investigations into criminal offences that occurred prior to Act 694 based on the Latin maxim of *nullum tempus occurrit* as was decided by the High Court in the case of *Dr Che Abdul Daim bin Hj Zainuddin & Ors v Suruhanjaya Pencegahan Rasuah Malaysia & Anor* [2024] 11 MLJ 683, then by logical extension thereof, they surely must also be able to use the tools contained in Act 694 in the course of such investigations; and (d) just because the offence may possibly predated 2009, the respondents could not be expected to rely on the public prosecutor or the court to issue summons under s 51 Criminal Procedure Code for the production of documents when they had express powers given to them under Act 694 to issue notices requesting for information (see paras 25–26, 29, 31 & 35–36).
- (2) The saving clause provided under s 74(3) of Act 694 was not applicable because in the present case, there were no investigations or pending investigations into Abdul Daim before Act 694 came into force as investigations were commenced only in 2023 after receiving a complaint ie much later after Act 694 came into force (see paras 32–33).
- (3) Under all the circumstances of the case, the court found that the said s 36 notices were valid and not illegal/ultra vires as contended. As the respondents had reasonable grounds to believe that an offence had been committed by Abdul Daim and further believed that the applicant may assist in the investigation, there was no procedural impropriety on the part of the respondents when issuing the said s 36 notices. The court also found that the said s 36 notices were not retrospective or ultra vires and did not violate the rights of the applicant under arts 5, 7 and 8 of the Federal Constitution (see para 37).
- (4) It was clear that the cornerstone of the applicant's application was that the said s 36 notices were illegal but the court noted that there had been no allegation whatsoever that the respondents' action was actuated by mala

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- A fides. Therefore, in the court's view, the applicant had clearly failed to establish mala fides on the part of the respondents in having issued the said s 36 notices (see para 18).
- (5) The court was of the view that there had been no unfair state action against the applicant but rather an enforcement body utilising express powers given to them in relation to an investigation process being properly carried out. It was trite law that the carrying out of such investigative powers were not amenable to judicial review unless possibly on the grounds of mala fides or if exceptional circumstances existed warranting the court's interference. On the facts of the present case, the court found no mala fides nor any exceptional circumstances warranting the court's interference by way of judicial review. As such, the general proposition of law that the exercise of functions in relation to criminal investigations was not amenable to judicial review prevailed. The court further found that no arguable case had been disclosed in favour of granting any relief therefore negating any requirement for a substantive hearing as requested and that granting leave would be an exercise in futility (see paras 38 & 40–41).
- E **[Bahasa Malaysia summary]**
Pemohon melalui permohonan semakan kehakiman semasa di bawah A 53 Kaedah-Kaedah Mahkamah 2012 memohon untuk membatalkan tiga notis untuk mendapatkan maklumat yang dikeluarkan oleh Suruhanjaya Pencegahan Rasuah Malaysia menurut s 36(1)(b) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta 694') dan untuk memohon satu pengisytiharan bahawa notis-notis tersebut adalah tidak sah. Berhubung dengan perkara ini, permohonan maklumat tersebut daripada pemohon adalah atas dasar bahawa beliau adalah rakan sekutu kepada Abdul Daim bin Zainuddin yang sedang dalam siasatan. Isu yang perlu ditentukan oleh mahkamah ialah sama ada permohonan kebenaran semakan kehakiman perlu dibenarkan. Inti pati penghujahan pemohon adalah bahawa notis-notis s 36 tersebut adalah menyalahi undang-undang dan/atau ultra vires terutamanya disebabkan oleh fakta bahawa maklumat yang diinginkan melalui notis-notis tersebut adalah daripada tahun 1997 tetapi s 36 Akta 694 hanya berkuat kuasa pada tahun 2009, oleh itu, penggunaan notis-notis s 36 tersebut adalah melebihi bidang kuasa kerana notis-notis tersebut yang berfungsi sebagai alat untuk menyiasat tidak wujud sebelum Akta 694 digubal. Selanjutnya, pemohon berhujah bahawa walaupun responden-responden mempunyai kuasa untuk menyiasat kesalahan sebelum Akta 694 melalui Akta Pencegahan Rasuah 1961 (Akta 57) (dimansuhkan oleh Akta 575) dan Akta Pencegahan Rasuah 1997 (Akta 575) (dimansuhkan oleh Akta 694) tetapi notis-notis s 36 tersebut hanya boleh digunakan mulai tarikh berkuat kuasa pada tahun 2009 dan klausa pengecualian dalam s 74 Akta 694 tidak dapat membantu responden-responden. Akhir sekali, pemohon berhujah bahawa notis-notis

s 36 yang dikeluarkan oleh responden-responden telah melanggar hak perlembagaan pemohon yang dijamin di bawah perkara 5, 7 dan 8 Perlembagaan Persekutuan dan oleh itu tidak berperlembagaan.

Diputuskan, menolak permohonan untuk kebenaran tanpa perintah berkaitan kos:

- (1) Hujahan pemohon bahawa notis-notis s 36 tersebut adalah menyalahi undang-undang/ultra vires tidak mempunyai merit atas sebab-sebab berikut: (a) sebelum Akta 694, pendakwa raya mempunyai kuasa untuk mengeluarkan notis bagi mendapatkan maklumat di bawah s 32 Akta Pencegahan Rasuah 1997 yang pari materia dengan s 36 Akta 694; (b) memandangkan penyiasatan terhadap kemungkinan kesalahan yang dilakukan oleh Abdul Daim hanya dimulakan selepas Akta 694 berkuat kuasa, maka, walaupun maklumat yang diminta oleh notis-notis tersebut mungkin bertarikh sejak tahun 1997, notis-notis s 36 tersebut adalah masih sah dan dikeluarkan dengan betul oleh responden-responden; (c) jika responden-responden mempunyai kuasa di bawah Akta 694 untuk memulakan siasatan terhadap kesalahan jenayah yang berlaku sebelum Akta 694 berkuatkuasa berdasarkan pepatah Latin *nullum tempus occurrit* seperti yang diputuskan oleh Mahkamah Tinggi dalam kes *Dr Che Abdul Daim bin Hj Zainuddin & Ors v Suruhanjaya Pencegahan Rasuah Malaysia & Anor* [2024] 11 MLJ 683, maka lanjutan itu secara logiknya, mereka juga pasti boleh menggunakan alat yang terkandung dalam Akta 694 semasa menjalankan penyiasatan tersebut; dan (d) hanya kerana kesalahan tersebut mungkin berlaku sebelum tahun 2009, responden-responden tidak boleh diharapkan untuk bergantung kepada pendakwa raya atau mahkamah untuk mengeluarkan saman di bawah s 51 Kanun Tatacara Jenayah untuk mengemukakan dokumen apabila mereka mempunyai kuasa nyata yang diberikan kepada mereka di bawah Akta 694 untuk mengeluarkan notis bagi meminta maklumat (lihat perenggan 25–26, 29, 31 & 35–36).
- (2) Klausula pengecualian yang diperuntukkan di bawah s 74(3) Akta 694 tidak terpakai kerana dalam kes ini, tiada penyiasatan atau penyiasatan yang belum selesai terhadap Abdul Daim sebelum Akta 694 berkuat kuasa kerana penyiasatan hanya dimulakan pada 2023 selepas menerima aduan iaitu lama selepas Akta 694 berkuat kuasa (lihat perenggan 32–33).
- (3) Di bawah semua keadaan kes, mahkamah mendapati notis-notis s 36 tersebut adalah sah dan tidak menyalahi undang-undang/ultra vires seperti yang dipertikaikan. Memandangkan responden-responden mempunyai alasan yang munasabah untuk mempercayai bahawa kesalahan telah dilakukan oleh Abdul Daim dan seterusnya percaya bahawa pemohon boleh membantu dalam penyiasatan, maka tidak

- A terdapat ketidakwajaran prosedur di pihak responden-responden semasa mengeluarkan notis-notis s 36 tersebut. Mahkamah juga mendapati notis-notis s 36 tersebut tidak retrospektif atau ultra vires dan tidak melanggar hak-hak pemohon di bawah perkara 5, 7 dan 8 Perlembagaan Persekutuan (lihat perenggan 37).
- B (4) Adalah jelas bahawa asas permohonan pemohon adalah bahawa notis-notis s 36 tersebut adalah menyalahi undang-undang tetapi mahkamah mendapati tidak terdapat apa-apa dakwaan bahawa tindakan responden-responden adalah digerakkan oleh mala fides. Oleh itu, pada
- C pandangan mahkamah, pemohon jelas gagal membuktikan mala fides di pihak responden-responden dalam mengeluarkan notis-notis s 36 tersebut (lihat perenggan 18).
- D (5) Mahkamah berpendapat bahawa tidak terdapat tindakan penguatkuasa yang tidak adil terhadap pemohon sebaliknya badan penguatkuasaan menggunakan kuasa nyata yang diberikan kepada mereka berhubung proses penyiasatan yang dijalankan dengan betul. Sudah menjadi undang-undang yang mantap bahawa pelaksanaan kuasa penyiasatan sedemikian tidak boleh disemak melalui semakan kehakiman melainkan mungkin atas alasan mala fides atau jika wujudnya keadaan luar biasa yang memerlukan campur tangan mahkamah. Berdasarkan fakta kes semasa, mahkamah mendapati tiada mala fides atau apa-apa keadaan luar biasa yang mewajarkan campur tangan mahkamah melalui semakan kehakiman. Oleh itu, proposisi am undang-undang bahawa pelaksanaan fungsi berhubung dengan penyiasatan jenayah tidak boleh disemak melalui semakan kehakiman adalah kekal. Mahkamah seterusnya mendapati bahawa tiada kes yang boleh dipertikaikan telah ditunjukkan bagi membolehkan pemberian apa-apa relif justeru itu menafikan apa-apa keperluan untuk pendengaran substantif seperti yang diminta dan bahawa pemberian kebenaran akan menjadi sia-sia (lihat perenggan 38 & 40–41).]
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Cases referred to

- H *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, SC (refd)
Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)
City Growth Sdn Bhd & Anor v The Government of Malaysia [2006] 1 MLJ 581, HC (refd)
- I *Dr Che Abdul Daim bin Hj Zainuddin & Ors v Suruhanjaya Pencegahan Rasuah Malaysia & Anor* [2024] 11 MLJ 683; [2024] 4 MLRH 260, HC (refd)
Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2018] supp MLJ 16, FC (refd)

- Kanawagi all Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495, HC (refd) **A**
- Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656, HC (refd)
- Regina v Director of Public Prosecutions, ex parte Kebilene and others* [2000] 2 AC 326, QBD (refd) **B**
- Sundra Rajoo all Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (refd)
- Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor* [2017] 5 MLJ 349, FC (refd)
- Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60, CA (refd) **C**
- WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296, FC (refd)

Legislation referred to

- Anti-Corruption Act 1997 (repealed by Malaysian Anti-Corruption Commission Act 2009) s 32 **D**
- Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1), 50(1)
- Criminal Procedure Code ss 51, 51A **E**
- Federal Constitution arts 5, 7, 7(1), 8, 145
- Malaysian Anti-Corruption Commission Act 2009 ss 3, 5(6), 6(4) 23, 36, 36(1)(b), 74, 74(3)
- Optical Discs Act 2000
- Prevention of Corruption Act 1961 (repealed by Anti-Corruption Act 1997) **F**
- Rules of Court 2012 O 53, O 53 rr 3, 3(2), 3(3)
- Amer Hamzah Arshaad (with Joshua Tay and Kee Shu Min) (Amerbon) for the applicant.*
- Teh Li Siew (Senior Federal Counsel, Attorney General Chambers) for the respondents.* **G**

Anand Ponnudurai J:

INTRODUCTION

[1] The applicant commenced this judicial review proceedings pursuant to O 53 Rules of Court 2012 seeking the following reliefs:

- a. Suatu perintah certiorari untuk membatalkan Notis untuk mendapatkan maklumat di bawah seksyen 36(1)(b) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang diserahkan kepada Pemohon pada 23 Februari 2024, 22 Mac 2024 dan 26 April 2024 (Notis-Notis Seksyen 36 tersebut); **I**
- b. Suatu deklarasi bahawa Notis-Notis Seksyen 36 tersebut adalah tidak sah;

- A c. Apa-apa relif lanjutan atau relif lain yang dianggap adil oleh Mahkamah.
d. Penggantungan (*stay*) prosiding atas Notis-Notis Seksyen 36 tersebut sementara menunggu bicara dan pelupusan pendengaran permohonan substantif semakan kehakiman ini.

B [2] It is not disputed that the second respondent is an entity established under the Malaysian Anti-Corruption Commission Act 2009 ('the MACC 2009') for the prevention of corruption in Malaysia whereas the first respondent is its Chief Commissioner responsible for the directions, control and supervision of all matters related to MACC 2009.

C [3] It is clear that the applicant through this application seeks to quash three notices to obtain information issued pursuant to s 36(1)(b) of the MACC 2009 served on the applicant on 23 February 2024, 22 March 2024 and 26 April 2024 (collectively referred to as 'the said s 36 notices') and a declaration that the said s 36 notices are invalid.

D [4] The applicant is also seeking a stay of proceedings in relation to the said s 36 notices pending the hearing and disposal of this application.

E [5] As prescribed by O 53 r 3 of the Rules of Court 2012, it is mandatory that leave be first obtained for an application for judicial review. Whilst O 53 r 3(2) of the Rules of Court 2012 provides that such leave application may be made *ex parte*, O 53 r 3(3) of the Rules of Court 2012 provides that the applicant must give such notice of application for leave to the Attorney General's Chambers. There is therefore no doubt that the involvement of the Attorney General at the leave stage is expressly recognized and the court is obliged to hear the Attorney General at the leave application stage. See the cases of *Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495 and *Pegum Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656.

F [6] The Attorney General appears at the leave stage in the capacity of AG and as the guardian of public interest and not for the particular respondent(s). In most cases, especially in those where the application relates to a decision of an inferior Tribunal, the Attorney General generally will not object to the leave application. However, in this case, when the matter was first called up for the hearing of the leave application on 4 June 2024, learned senior federal counsel appearing for the AGC had informed the Court that the AG intended to object to the leave application herein. I thus fixed the leave application for hearing on 18 June 2024 and granted an interim stay of the said s 36 notices.

I [7] I had on 18 June 2024 heard learned counsel for the applicant and

learned senior federal counsel, and upon their request had allowed both to file a further brief submission on 21 June 2024 and fixed the matter for decision on 25 June 2024.

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[8] Having considered the facts and the submission of both parties, I will hereinbelow set out the grounds for this application, the contentions of the applicant and the learned senior federal counsel and my analysis of the same with a view of deciding whether or not leave should be granted to the applicant as prayed for.

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GROUNDS FOR JUDICIAL REVIEW

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[9] From the affidavit filed and the submissions of learned counsel for the applicant, it is clear that the basis for this application is on three main grounds as follows:

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(a) that the said s 36 notices issued by the first respondent, acting as the chief commissioner of the second respondent are tainted with illegality, irrationality, and/or procedural impropriety as:

(i) the respondents do not have the power to issue the said s 36 notices to obtain information from the applicant;

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(ii) the said s 36 notices were used as the starting point of the investigation. It should be issued by the second respondent after an investigation has been conducted, and not before any investigation is conducted or at the commencement of such investigation. The said s 36 notices should be used to verify the findings of the Second respondent's investigation to trace and track assets related to the alleged offences;

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(iii) from 1997 until January 1999 and from 1 June 2001 to the present, Abdul Daim bin Zainuddin (Daim) was not an officer of a public body. As such, during these periods, there could not have been any offence(s) under s 23 of the MACC 2009 committed by Daim;

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(iv) the said s 36 notices did not fulfil the legal requirements under para 36(1)(b) of the MACC 2009; and

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(v) the respondents failed to demonstrate that the applicant is an associate of Daim under any of the five categories defined in the interpretation of 'associate' in s 3 of the MACC 2009. The applicant cannot be categorised as falling under the definition of 'associate' as provided in Section 3 of the MACC 2009.

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(b) that the said s 36 notices, which require the applicant to provide information covering the period from 1997 to the present, for 27 years,

- A** are unreasonable, disproportionate, oppressive and/or procedurally improper in that:
- B** (i) the information requested over the 27-year period is extensive and not limited to property held or acquired by Daim as a result of or in connection with offences under s 23 of the MACC 2009;
- C** (ii) the information requested includes identifying the status of each asset, whether transferred or not transferred, whether within or outside Malaysia, owned or held by the applicant or concerning which the applicant has any interest, the date the assets were acquired, the method of acquisition, estimated value, the location of each identified asset, sources of income, acquisitions, or assets of the applicant from 1997 to the present, and so forth;
- D** (iii) it is impossible and impractical for the applicant to fully comply with the said s 36 notices and effectively provide the requested information as it involves numerous detailed transactions to which the applicant no longer has access; and
- E** (iv) the said s 36 notices, which are unclear, cover a long period and require extensive information, are prejudicial to the applicant because any unintentional failure, mistake, or omission to declare all of the applicant's assets may lead to or expose the applicant to possible prosecution.
- F** (c) that the said s 36 notices issued by the respondents had violated the applicant's constitutional rights guaranteed under arts 5, 7 and 8 of the Federal Constitution and therefore unconstitutional in that:
- G** (i) the said s 36 notices were issued against the applicant because the first respondent claimed to have reasonable grounds to believe that an offence under s 23 of the MACC 2009 had been committed by Daim, however, such an offence did not exist before 2009. The said s 36 notices are ultra vires and retrospective, violating art 7(1) of the Federal Constitution;
- H** (ii) the said s 36 notices have impacted, deprived, or encroached upon the applicant's rights and protections guaranteed under arts 5 and 8 of the Federal Constitution, including the right to privacy, the right against self-incrimination, and protection against unfair state action;
- I** (iii) s 36 of the MACC 2009 should not be interpreted broadly and beyond its scope; instead, it should be construed strictly and narrowly, and all legal requirements must be complied with to ensure a proper balance between individual rights and public interest so that the notices do not become oppressive and/or unfair; and

- (iv) if s 36 of the MACC 2009 is interpreted broadly and beyond its scope, it would allow the respondents to obtain information beyond their jurisdiction and violate the applicant's guaranteed rights and protection under art 5 of the Federal Constitution. **A**

OBJECTIONS RAISED BY THE ATTORNEY GENERAL **B**

[10] The Attorney General in objecting to the leave application herein contends as follows:

- (a) that investigative powers of the enforcement bodies are not amenable to judicial review proceedings; **C**
- (b) that investigative powers may only be challenged where there is dishonesty or mala fide or exceptional circumstances;
- (c) that the onus of proving mala fides on the part of the respondents is on the applicant; and **D**
- (d) that a higher threshold of scrutiny should be applied.

ANALYSIS **E**

Applicable Law

[11] As a general rule, decided cases clearly reveal that the threshold for granting leave for judicial review is quite low and that an applicant only need show that prima facie the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application and there are grounds to consider the allegations made by the applicant. See the case of *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228. **F**
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[12] However, decided cases have also held that leave should be refused where:

- (a) the subject matter of the judicial review is one which by settled law (written law or common law) is non-justiciable. See the Court of Appeal case of *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; and **H**
- (b) it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies and where the application for judicial review is inappropriate. See the case of *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224. **I**

A [13] In relation to cases where judicial review applications refer to the
investigative powers of enforcement bodies, decided cases support the position
that such investigative powers are not amenable to judicial review proceedings.
The High Court in the case of *City Growth Sdn Bhd & Anor v The Government
of Malaysia* [2006] 1 MLJ 581 (which was affirmed by the Federal Court in the
B case of *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa
Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia
& Anor* [2018] supp MLJ 16) held that s 50(1) of the Anti-Money Laundering
Act 2001 ('the AMLA 2001') is part and parcel of the investigation process into
C an offence under s 4(1) of the AMLA 2001 and by issuing the said orders, the
deputy public prosecutor was merely exercising a function under AMLA 2001.

D [14] The proposition in the case of *City Growth* has been affirmed by the
Federal Court in *Empayar Canggih* where in that case, the enforcement officers
from the Ministry of Domestic Trade and Consumer Affairs raided a factory of
the appellant — a manufacturer of video compact discs — and seized
machinery and equipment under the Optical Discs Act 2000 ('the ODA'). The
Appellant there applied for judicial review for an order of mandamus to compel
E the second respondent to return the seized machines and equipment. The
Federal Court, after having referred to *City Growth* reiterated that such an
exercise of power in the course of a criminal investigation was not open to
judicial review under O 53 of the Rules of Court 2012.

F [15] However, there appears to have been some inroad on the court's powers
and a slight change to the landscape on this issue. In the case of *Suruhanjaya
Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor* [2017] 5
MLJ 349, the Federal Court whilst similarly holding that the actions or
decisions of a public authority in the exercise of its powers in the course of
criminal investigation or enquiry were not open to judicial review, it went on to
G hold that a decision of a public authority in the course of a criminal
investigation or the executive's decision is not totally unreviewable by way of
judicial review but dependent on the facts of each case, including dishonesty or
mala fides or exceptional circumstances relying on the case of *Regina v Director
of Public Prosecutions, ex parte Kebilene and others* [2000] 2 AC 326.

H [16] Thereafter, in the more recent case of *Sundra Rajoo a/l Nadarajah
v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199,
the Federal Court has held that the AG/public prosecutor's powers under art
145 of the Federal Constitution could be reviewed subject to a higher threshold
I of scrutiny.

[17] Having set out the applicable law above, the AG's position is that the
decision to issue the said s 36 notices is not amenable to judicial review as they
merely relate to an exercise of investigative functions.

[18] Similarly, in relation to the decisions of the Federal Court in *Latheefa Beebi Koya* and *Sundra Rajoo*, it is clear that the cornerstone of the applicant's application herein is that the said section 36 notices are illegal but the court notes that there has been no allegation whatsoever herein that the respondents' action is actuated by mala fides. Therefore, in my view, the applicant has clearly failed to establish mala fides on the part of the respondents in having issued the said s 36 notices.

[19] Before I proceed to analyse the rival contentions, it may be apt that I set out and reproduce the final s 36 notice dated 26 April 2024 for its full effect:



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(i) yang mengenalpasti tiap-tiap harta yang dihantar keluar dari Malaysia oleh kamu bermula dari 1997 hingga terkini;

(ii) yang menyatakan nilai anggaran dan tempat letaknya setiap harta yang dikenal pasti di bawah subperenggan (i) dan (ii), dan jika mana-mana harta itu tidak dapat diketahui tempat letaknya sebab mengapa;

(iv) menyatakan berkenaan dengan setiap harta yang dikenal pasti di bawah subperenggan (i) dan (ii) sama ada harta itu dipegang oleh kamu atau oleh mana-mana orang lain bagi pihak kamu, sama ada harta itu telah dipindahmilikan, dijual kepada atau disimpan dengan mana-mana orang, sama ada harta itu telah susut nilainya sejak kamu memperolehnya, dan sama ada ia telah berbaur dengan harta lain yang tidak dapat dipisahkan atau dibagikan tanpa kesukaran;

(v) menyatakan segala maklumat lain yang berbubungan dengan setiap harta yang dikenal pasti di bawah subperenggan (i) dan (ii), dan perniagaan, perjalanan atau kegiatan-kegiatan lain kamu dan,

(vi) menyatakan segala punca pendapatan, perolehan atau aset kamu bermula dari bermula dari 1997 hingga terkini;

2. Pernyataan bersumpah atau berikrar yang tersebut di atas hendaklah diserahkan sendiri atau dengan pos berdaftar kepada saya di alamat Pejabat Ketua Pesuruhjaya, Suruhanjaya Pencegahan Rasuah Malaysia, No.2 Lebuhr Wawasan, Presint 7, 62250 Putrajaya dalam tempoh 30 hari dari tarikh penyampaian NOTIS ini kepada kamu.

3. **AMBIL PERHATIAN** bahawa menurut seksyen 36(2) Akta tersebut, seseorang yang dihantar kepadanya satu NOTIS di bawah seksyen 36(1) hendaklah, walau apa pun mana-mana undang-undang bertulis atau rukun undang-undang yang

halaman 30(8)



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3 SPRM 810/00

berlawanan, mematuhi terma NOTIS ini dalam masa yang dinyatakan di dalamnya, dan mana-mana orang yang dengan sengaja mengabaikan atau tidak mematuhi terma NOTIS ini adalah melakukan suatu kesalahan dan apabila disabitkan boleh dipenjarakan selama tempoh tidak melebihi lima tahun dan boleh didenda tidak melebihi satu ratus ribu ringgit.

4. **AMBIL PERHATIAN** bahawa menurut Seksyen 36(S) Akta tersebut, seseorang yang dihantar kepadanya satu NOTIS di bawah seksyen 36(1) Akta tersebut, hendaklah terikat untuk menyatakan yang benar dan hendaklah mendedahkan segala maklumat yang diketahui, atau tersedia untungnya atau yang dapat diperolehi olehnya.

25 APR 2024

Tarikh




 Pesuruhjaya/
 Timbuan Ketua Pesuruhjaya/
 Ketua Pesuruhjaya
 TAN SRI DATO' SERI ALAN BEAUMONT
 BUTIR PENCAMAN
 DARIPADA NOTIS PENCAMAN BERSEKUTUAN

Nota 1(a), 20(1)(b)



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 *Note: Serial number will be used to verify the originality of this document via eFILING portal

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[20] Reverting back to the contentions of the applicants. First and foremost, I have no hesitation whatsoever in rejecting the second ground advanced that the said s 36 notices requiring information for a period of 27 years are too extensive and unreasonable. In this regard, the applicant herself has averred that she had made attempts to retrieve the relevant information required in the said s 36 notices and these include requests made to several banks such as Hong Leong Bank Bhd, CIMB Bank Bhd, Malayan Banking Bhd as well as RHB Bank Bhd for bank statements/details but there has yet to be any reply to date. The applicant has also averred she has since retired and is no longer active in the business world and most documents and records previously held by her were disposed in 2020. With respect, in my view, these are at best mere

- A impracticalities and have no bearing on the issuance and/or legality of the said s 36 notices themselves. In my further view, the applicant should comply with the said notices and provide/disclose information that she has and it will then be up to the respondents to consider their next course of action if there has been insufficient information provided. If criminal action is commenced against the
- B applicant for any nondisclosure, she would be at full liberty to raise any issues as a defence therein in relation to any inability to provide information.

- C [21] Similarly, on the applicant's contention that the said s 36 notices are tainted with irrationality and/or procedural impropriety on the ground that they have been issued before any investigation has been conducted and/or that they have failed to demonstrate that she is an associate of Abdul Daim bin Zainuddin, I again find this contention without merit. In this regard, whilst s 36 of the MACC 2009 clearly allows the respondents to require the applicant
- D to furnish the information if it has reasonable grounds to believe based on the investigation that an offence has been committed, based on the actual notice, it is clear that this has been complied with as a perusal of the notice will clearly reflect that based on investigations, an offence under s 23 of the MACC 2009 has been committed. There does not seem to be any basis for the applicant's
- E contention that the s 36 notice to the applicant was the starting point for investigation when the notice themselves clearly indicates that the investigation had already commenced.

- F [22] Further, whilst the said s 36 notices refer to the fact that the request for information to the applicant is on the basis that she is an associate ('sekutu') of Abdul Daim bin Zainuddin, having perused s 36(1)(b) of the MACC 2009, it provides that the respondents may require any relative or associate or any other person whom the officer has reasonable grounds to believe is able to assist in the investigation to furnish a statement. Reverting to the actual s 36 notices, it is
- G clear that the respondents are of the view and believe that the applicant can assist in the investigations. In my view, there is no necessity to demonstrate at this juncture how and why the applicant is considered an associate and stating that the disjunctive belief that she may assist in the investigation is sufficient.

- H [23] However, at the Hearing of the leave application, it became clear that the crux of the applicant's submission in this application is that the said s 36 notices are illegal and/or ultra vires primarily due to the fact that the information sought through the same date back to 1997 but that s 36 of the MACC 2009 came into force only in 2009. As such, it is contended that the
- I utilisation of the said s 36 notices was in excess of jurisdiction as the said notices being a tool to investigate were non-existent prior to the enactment of MACC 2009. It is further contended by the applicant that whilst the respondents do indeed have the power to investigate offences prior to MACC 2009 via the Prevention of Corruption Act 1961 and the Anti-Corruption Act 1997, it is

submitted that the utilization of the said s 36 notices could only be utilised from the effective date of 2009 and that the saving clause in s 74 MACC 2009 does not assist the respondents.

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[24] During submissions, reference was made by both parties to the recent decision of *Dr Che Abdul Daim bin Hj Zainuddin & Ors v Suruhanjaya Pencegahan Rasuah Malaysia & Anor* [2024] 11 MLJ 683; [2024] 4 MLRH 260 where the High Court there had ruled that s 74(3) of the MACC 2009 was an express saving provision. However, I note that the issue in that case was whether or not it was proper to commence an investigation on an allegation of an offence that occurred more than 20 years ago and prior to MACC 2009. However, in the present case, the facts are slightly different in that the issue is one of whether or not the respondents have the power to use s 36 of the MACC 2009 as a tool to investigate offences preceding 2009.

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[25] In my view, there can be no doubt that the respondents can indeed investigate offences prior to MACC 2009. In such situation, the issue then is how are they to proceed to carry out such investigation and whether they can resort to s 36 MACC 2009 to issue notices as a means to obtaining information even for offences commenced prior to 2009. Having considered all matters, I am of the view that the applicant's contention that the said s 36 notices are illegal/ultra vires is without merit for the following reasons.

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[26] Firstly, there is no doubt that the MACC 2009 only came into force in 2009 and that the said s 36 notices were issued seeking information from 1997 to date. Prior to MACC 2009, the public prosecutor had powers to issue notices seeking information under s 32 of the Anti-Corruption Act 1997 which is *pari materia* with s 36 of the MACC 2009.

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[27] Further, s 6(4) of the MACC 2009 provides as follows:

6 Appointment of other officers of the Commission

...

(4) Every officer and junior officer of the commission shall have such powers as may be provided for him under this Act and shall be subject to the direction, control and supervision of the chief commissioner or any other officer of the commission superior to him in rank, and shall exercise his powers, perform his functions, and discharge his duties in compliance with such directions or instructions as may be specified orally or in writing by the chief commissioner or any other officer of the commission superior to him in rank.

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[28] Similarly, s 5(6) of the MACC 2009 provides as follows:

5 Chief Commissioner

A (6) The chief commissioner shall have all the powers of an officer of the commission and shall have such powers of a Deputy Public Prosecutor as authorized by the Public Prosecutor for the purposes of this Act.

B [29] In the recent decision of the High Court of *Dr Che*, it was held that the respondents have the power to initiate investigations of criminal allegations that occurred prior to MACC 2009 based on the Latin maxim of *nullum tempus occurrit*. Justice Wan Fareed held there as follows:

C As to whether it was proper to commence an investigation on an allegation of an offence that occurred more than twenty years ago, I am of the respectful view that the maxim of *nullum tempus occurrit regi* applies. It simply means ‘time does not run against the Crown’. That the defence of the alleged offence is stale, so to speak, is unknown to our criminal law. If, at all, as demonstrated in *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111; [1982] 1 MLRH 786, the contention that an offence is ‘stale’ can only be argued as an extenuating circumstance during plea in mitigation upon conviction.

D [30] The above decision of the High Court was affirmed by the Court of Appeal on 17 May 2024.

E [31] In my considered view, if the respondents do indeed have the power vide MACC 2009 to initiate investigations into criminal offences that occurred prior to MACC 2009, then by logical extension thereof, they surely must also be able to use the tools contained in the MACC 2009 in the course of such investigations.

F [32] In relation to the applicability of the saving clause of s 74(3) of the MACC 2009, it appears that both parties are of the view that the saving clause provided under s 74(3) of the MACC 2009 is not applicable. Section 74(3) of the MACC 2009 reads as follows:

G 74 Saving.

H (3) The provisions of this Act which relate solely to procedure or evidence shall apply to any offence against the law repealed under section 73 and such provisions may be used in the course of any pending investigations and in any court proceedings instituted before or after the commencement of this Act in respect of such offence.

I [33] In the current case, there is no disputing that there were no investigations or pending investigations into Abdul Daim before MACC 2009 came into force as investigations were commenced only in 2023 after receiving a complaint ie much later after MACC 2009 came into force. The situation would be different if there was a pending investigation against Abdul Daim prior to coming into force of MACC 2009 and then the said s 36 notices be utilised by the respondents herein. In such circumstances, the validity of the

said s 36 notices could be challenged on the basis that such notices should properly be issued by the public prosecutor.

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[34] However, in the current case, it is beyond per adventure that there was no investigation prior to MACC 2009 and that investigations were only initiated post-MACC 2009. In such a scenario, the applicant now contends that ss 51 and 51A of the Criminal Procedure Code should be the tool utilised to obtain the information from the applicant. With respect, I disagree. Firstly, s 51 Criminal Procedure Code is a summons to produce documents and is issued whenever any court or police officer considers the production necessary. Here and in the current situation, we are dealing not with the summons to produce documents but rather a notice under a specific Act to obtain information following an investigation into an offence committed under the very same Act.

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[35] In my view, since the investigation into the possible offences committed by Abdul Daim was only commenced after the coming into force of MACC 2009, then, notwithstanding that the information so requested by the said notice may relate back to 1997, the said s 36 notices are still valid and properly issued by the respondents. In my opinion, the very purpose of s 36 of the MACC 2009 is to provide the respondents with the necessary tools to investigate possible offences where such investigations have only commenced after coming into force of MACC 2009.

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[36] In my further view, the possibility that the offence may have been committed prior to 2009 cannot and does not negate the legality of the said s 36 notices herein. In my opinion, the respondents are certainly entitled to use the s 36 notices as they have for any investigations that have commenced after the coming into force of MACC 2009. In my opinion, just because the offence may possibly predate 2009, it is certainly cannot be expected of them to then rely on the Public Prosecutor or the Court to issue summons under s 51 of the Criminal Procedure Code for the production of documents when they have express powers given to them under the MACC 2009 to issue notices requesting for information.

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[37] As such, under all the circumstances of the case, I find that the said s 36 notices are valid and not illegal/ultra vires as contended. In my view, as the respondents have reasonable grounds to believe that an offence has been committed by Abdul Daim and further believes that the applicant may assist in the investigation, there was no procedural impropriety on the part of the respondents when issuing the said s 36 notices. I also find that the said s 36 notices are not retrospective or ultra vires and do not violate the rights of the applicant under arts 5, 7 and 8 of the Federal Constitution.

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A [38] In my opinion, there has been no unfair state action against the applicant but rather an enforcement body utilising express powers given to them in relation to an investigation process being properly carried out. It is trite law that the carrying out of such investigative powers are not amenable to judicial review unless possibly on the grounds of mala fides or if exceptional circumstances exist warranting the court's interference. On the facts adduced so far, I find no mala fides nor any exceptional circumstances warranting the court's interference by way of judicial review.

C [39] In conclusion, the applicant has attempted to persuade me that leave should be granted and that the following issues require a detailed examination and determination via a substantive hearing:

- D (a) whether the respondents have the power or jurisdiction under s 36 of the MACC 2009 to issue notices requesting information for periods preceding the coming into force of MACC 2009?
- D (b) whether s 74 of the MACC 2009 confers the power or jurisdiction to the respondents to issue notices by way of s 36 of the MACC 2009 requesting information for periods preceding the coming into force of MACC 2009? and
- E (c) whether the s 36 notices issued against the applicant contravene art 7 of the Federal Constitution?

F [40] For the various reasons set out in this judgment, with respect, I am not so persuaded. The applicant has failed to establish prima facie that the issuance of the said s 36 notices falls within the traditional grounds for judicial review nor have they established mala fides.

G [41] As such, the general proposition of law that the exercise of functions in relation to criminal investigations is not amenable to judicial review prevails. I further find that no arguable case has been disclosed in favour of granting any relief therefore negating any requirement for a substantive hearing as requested and that granting leave would be in exercise in futility. See the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296.

H [42] In the upshot, I am of the view that leave is not warranted and would dismiss the application for leave with no order as to costs.

I *Application for leave dismissed with no order as to costs.*

Reported by Dzulqarnain Ab Fatar